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BEFORE THE
Federal Communications Commission
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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
The Telephone Consumer Protection)
Act of 1991)

CC Docket No. 92-90 /

To: The Commission

REPLY COMMENTS OF
LEJEUNE ASSOCIATES OF FLORIDA

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SUMMARY

The comments in this proceeding support LeJeune's proposal for a national "Do Not Call" database to protect consumers from intrusive telemarketing practices. LeJeune's proposal for an off-line database, with information disseminated by disk, tape or paper, can be implemented at a reasonable cost. Such a database will fulfill consumer expectations and will be affordable for even the smallest telemarketer.

The Telephone Consumer Protection Act of 1991 ("TCPA") clearly requires the Commission to adopt regulations that address all telemarketing calls. Congress viewed live and auto dialed calls as two distinct problems. Moreover, consumer groups agree that live solicitations raise the same privacy concerns as do auto dialers.

The Commission accordingly must formulate a solution that will deal with all invasive solicitations. The record demonstrates that self-regulation by telemarketers has not been effective in curtailing unwanted calls. Company- and industry-specific lists are at best incomplete and place a significant burden on customers who want to avoid telemarketing solicitations. A national database, on the other hand, provides blanket protection from commercial calls and requires minimal consumer effort.

The costs of implementing and administering the database will be reasonable and can be recovered by charging telemarketers for database information. The system proposed by LeJeune relies on existing technology and has been successfully used in Florida. Commenters who claim that a database will be too expensive incorrectly assume that an on-line system will be necessary. LeJeune has demonstrated, however, that database information can be provided off-line using diskette, tape or paper media for distribution at a price that is affordable for all telemarketers. Furthermore, the database will save telemarketers money by reducing calls to unwilling consumers and will enhance enforcement of the TCPA by providing a "bright line" standard for compliance.

Finally, a national database will best satisfy consumer demand for relief from intrusive telemarketing calls. Customers who want to receive no commercial solicitations will have that option. In addition, the system is sufficiently flexible that it can accommodate consumers who may want to receive calls from a particular industry. And, of course, customers will still be able to receive calls from firms with which they have a prior business relationship. Thus, a national database system will maximize consumer choice.

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INTRODUCTION

LeJeune reiterates its strong support for a national "Do Not Call" database of residential subscribers who object to telephone solicitations. As discussed below, a national database, modeled on the Florida system, is the most practical and cost-efficient solution to the problem of intrusive telemarketing addressed by Congress in the Telephone Consumer

Protection Act of 1991 ("TCPA"). 1/ The record in this proceeding confirms Congressional judgment that telemarketing solicitation is a serious problem for consumers. Comments by consumer interest groups clearly indicate that unwanted solicitation is pervasive, and that current industry self-regulation is ineffective. The TCPA requires that the Commission now take action to regulate telemarketing practices in this area.

Many commenters assume that a national database would involve an expensive on-line system that would be extremely costly to telemarketers. LeJeune, however, submits that virtually all of the benefits of a national database can be achieved at much lower cost if the database information is distributed by disk, tape or paper media. Under this off-line system based on the Florida model, residential customers would call a single number to have their name entered into the database. These numbers would be distributed to telemarketers through regular updates, priced to avoid imposing an undue burden on even the smallest telemarketers. Restricted numbers would be available on a national, regional, state, or area code basis.

1/ Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

The database proposed by LeJeune presents the most cost-efficient and effective response to intrusive telemarketing. A single national database provides an easy and effective method for consumers to protect themselves against unwanted calls if they wish. It also provides a "bright line" standard to simplify compliance and minimize disputes between consumers and telemarketers -- an important consideration given the extensive enforcement provisions of the TCPA. And the cost of a national database should be far less than the cost of complying with the multiple state regulations that will develop if the FCC does not act now, not to mention the savings to marketers made possible by avoiding calls to unwilling consumers. Thus, a national database meets the demands of Congress and the needs of consumers, while effectively controlling costs to telemarketers. LeJeune strongly recommends that this approach be adopted.

I. THE COMMISSION MUST PROTECT RESIDENTIAL TELEPHONE SUBSCRIBERS AGAINST UNWANTED TELEPHONE SOLICITATIONS.

A. The TCPA Requires Regulation of All Telemarketing, Including Live Solicitations.

The TCPA mandates regulations that will restrict unwanted telemarketing to residential telephone subscribers. 2/

2/ 47 U.S.C. § 227(c)(2).

As several commenters point out, however, "[r]ather than address the problem of how to regulate [live solicitations], . . . , the FCC has reframed the issue as whether to regulate at all." 3/ LeJeune agrees that inadequate FCC rules would violate the TCPA. While the Commission has been granted some discretion to select the method of regulation, 4/ the Act does not permit the Commission to reconsider the need for regulation and decline to adopt new rules. Congress has made clear that new rules are needed to end invasions of privacy in consumers' homes.

Several commenting parties expressly suggest that the Commission should not regulate live solicitations. 5/ Others suggest that the Commission should implement only restrictions on auto dialers now, and save regulation of live solicitations for later. 6/ Such incomplete regulation, however, would be contrary to the express intent of Congress. As LeJeune discussed in its initial comments, the plain language of the Act and its legislative history reveal a specific concern with live

3/ See Center for the Study of Commercialism at 8.

4/ 47 U.S.C. § 227(c)(1)(A).

5/ See, e.g., Direct Selling Association at 4; Banc One Corp. et al. at 11-12; American Express Co. at 4.; J.C. Penney Co. at 13; Merrill Lynch at 2; LCS Industries at 5.

6/ See U S West Communications at 5; American Financial Services Association at 7.

telemarketing. 7/ Indeed, one entire segment of the Act is devoted to requiring the FCC to prescribe regulations to protect consumer privacy from unwanted live calls. 8/ The Commission may not render that section superfluous or empty by deciding on its own not to regulate live calls. 9/

The suggestion by some commenting parties (and reflected in the Commission's Notice) that auto dialer calls are more intrusive than live calls misrepresents the intent of Congress and ignores vital portions of the legislative history of the TCPA. 10/ The legislation as finally passed embodies the language of two bills, addressing distinct concerns -- the use of auto dialers and live solicitations. 11/ The Commission does not have the discretion to determine that regulation of one is

7/ For a detailed discussion of legislative history, see LeJeune Comments at 4-13. Other commenters agree that the Commission's Notice and the comments of parties opposing regulation incompletely describe the legislative history with regard to live solicitations. See Center for the Study of Commercialism at 9; National Consumers League at 12-13.

8/ 47 U.S.C. § 227(c).

9/ See Center for the Study of Commercialism at 7.

10/ Some commenters assert that Congress was more concerned with auto dialers than with live solicitations. See, e.g., American Express at 2-4; Association of National Advertisers (ANA) at 1; U S West Communications at 10. The legislative history, however, reflects an equal concern for regulation of live and automated calls. See supra note 7.

11/ See LeJeune at 12.

necessary, but not of the other. The statements of the principal sponsors reveal an equal concern with live solicitation and automated calls. 12/ The legislative findings in the Act do not distinguish between live and auto dialed calls. 13/ Both issues were important to Congress, and both must be addressed by Commission action. 14/

B. Consumer Comments Confirm the Need for a National "Do Not Call" Database.

"The nation's consumers expect that the TCPA will enable them to avoid frequent interruptions from telemarketers." 15/ Commenting parties representing consumers uniformly state that residential telephone subscribers feel that their privacy is disturbed by telephone solicitations. 16/ Private Citizen, Inc., for example, reports the results of several surveys that suggest a high level of consumer dissatisfaction with

12/ See LeJeune at 11-13.

13/ TCPA, § 2(1-8); see Center for the Study of Commercialism at 7.

14/ See National Consumers League at 12-13.

15/ See Consumer Action at 1.

16/ See National Consumers League at 6, 9; Center for the Study of Commercialism at 8, 10; Consumer Action at 1, 10; Privacy Times at 1.

telemarketing calls. 17/ Consumers clearly care about their privacy and will express their complaints if given the opportunity. 18/

The Commission may not assume that no significant problem exists simply because consumers do not routinely complain to the FCC about telemarketing. The Commission has, after all, never invited complaints about telemarketing, and in 1980, the Commission actually disclaimed any interest in the matter whatsoever. 19/ Many consumers, consequently, do not complain at all and suffer in silence. Others voice their dissatisfaction to local officials, senators and representatives, state consumer agencies, and private consumer interest groups. 20/ Thus, the number of FCC complaints regarding live solicitation simply does not reflect the magnitude of consumer dissatisfaction with such calls. 21/

17/ See Private Citizen at 1 (83% preferred not to be called; 70% viewed telemarketing calls as an invasion of privacy; 86% consider it annoying).

18/ See Center for the Study of Commercialism at 10; LeJeune at 7.

19/ See In re Unsolicited Telephone Calls, CC Docket No. 78-100, 77 F.C.C.2d 1023 (1980).

20/ See LeJeune at 6-10.

21/ See Center for the Study of Commercialism at 10; LeJeune at 8, 11.

Available evidence shows that consumers are very concerned about intrusive telemarketing practices. Despite the fact that participants do not realize a substantial reduction in calls, over 440,000 consumers have sought inclusion in the Direct Marketing Association's (DMA) Telephone Preference Service (TPS) "Do Not Call" list. In Florida, where a successful database system is currently in place, over 25,000 subscribers have asked to be put into the database -- even though they must pay an initial \$10 fee and \$5 annually to do so. 22/ In Massachusetts, nearly a third of telephone subscribers signed on for inclusion in a "Do Not Call" database. 23/ Consumer dissatisfaction is also apparent in the proliferation of state laws restricting telemarketing. 24/ Clearly, consumers are eager to relieve themselves of the constant intrusion on their privacy posed by telemarketers.

Moreover, consumer groups authoritatively reveal that consumers do not appreciate unwanted live solicitations any more than auto dialed calls. 25/ One party observes: "The harm is

22/ See LeJeune at 9-10.

23/ See NYNEX at 18.

24/ See LeJeune at 7.

25/ See Center for the Study of Commercialism at 7-9; Consumer Action at 9-10; National Consumers League at 12-13; Private Citizen at 5.

the loss of our privacy * * *. Whether calls are from people who dial phones, or program phone dialers, it's the same result." 26/ Rules must be drawn that restrict live solicitation in its own right. It is likely that restrictions on auto dialed calls alone would result only in a massive increase in intrusive live calls to fill the void. 27/ The Commission cannot meet the expectations of consumers by restricting auto dialed solicitations alone.

Consumer organizations agree with LeJeune that the only regulatory alternative that fully addresses consumer concerns and satisfies congressional intent is a national "Do Not Call" database. 28/ The need to provide choice to consumers who wish to block all telemarketing calls and the need for effective enforcement demand a national database. 29/

Telephone companies such as AT&T, Pacific Bell and Nevada Bell, and BellSouth also expressed support for a database system as long as telemarketers appropriately bear the costs of

26/ See Private Citizen at 5.

27/ Without restrictions on live solicitations as well, the policy scheme is incomplete or even harmful. See Consumer Action at 9-10.

28/ See Center for the Study of Commercialism at 11-13; Consumer Action at 2, 11; National Consumers League at 16-18; Privacy Times at 1-2.

29/ See Privacy Times at 1-2.

administration. 30/ AT&T noted that a "national database could offer consumers a convenient and efficient mechanism for preventing unwanted and intrusive telemarketing solicitations." 31/ BellSouth, the local exchange carrier in Florida, believes that the Florida system can provide a valuable model for a national database. 32/ Interestingly, even U S West Communications, which purportedly opposes a national database, supports and even recommends use of the Telephone Preference Service, currently the most prominent example of an operating national database. 33/ Moreover, U S West reveals that Oregon telemarketers have requested a list of directory-marked customers. In essence, they want an Oregon "Do Not Call" database. 34/

Other interests recognize the value of a national "Do Not Call" database. The New York Department of Public Services, for instance, states that "the establishment of a central national database of those subscribers that do not wish to

30/ See AT&T at 10-11; Pacific and Nevada Bell at 11; BellSouth at 6.

31/ See AT&T at 11.

32/ See BellSouth at 8.

33/ See U S West Communications at 7-8.

34/ See Id. at 12-13.

receive telemarketing calls appears to be the most efficient and economical way to accomplish the intent of protecting subscriber's privacy rights." 35/ The Utilities Telecommunications Council "would support such a database if its operation were found to be practicable." 36/ National Faxlist supports a similar national database for the fax industry. 37/ Thus, there is broad support for the database solution proposed by LeJeune.

C. Self-Regulation by the Telemarketing Industry is Ineffective.

The magnitude of the consumer dissatisfaction with current telemarketing practices reveals that whatever voluntary or even mandatory restrictions are presently in place do not work. Consumers remain frustrated with unwanted invasions of their privacy despite alleged widespread use of company-specific "Do Not Call" lists and directory marking schemes. Either companies do not in fact use such lists or they are wholly ineffective in protecting consumer privacy rights.

Many telemarketers point to their use of company-specific lists as evidence that self-regulation works

35/ See New York Department of Public Services at 1.

36/ See Utilities Telecommunications Council at 8.

37/ See National Faxlist at 4-5.

and that further regulation is unnecessary. 38/ Others suggest that use of the DMA's "Do Not Call" list is sufficient protection for consumer interests. 39/

There is clear evidence, however, that self-regulation is ineffective. 40/ In Massachusetts, where nearly a third of telephone subscribers asked to be included on a "Do Not Call" list, only nine companies purchased the list on a voluntary basis. 41/ Cox Enterprises likewise recognizes that "the voluntary use of [Do Not Call] lists has had limited success in freeing consumers from objectionable telemarketing calls." 42/ Most importantly, the Act itself finds that telemarketing is still pervasive, that it can be intrusive, and that many consumers are outraged. 43/

Contributing to the ineffectiveness of self-regulatory approaches is the fact that company-specific plans utilize

38/ See King Teleservices at 2; LCS Industries at 3; Merrill Lynch at 4; Consumer Bankers Association at 7.

39/ See U S West Communications at 15-16.

40/ Despite attempts at self-regulation, consumers remain unprotected from intrusive telemarketing calls. See supra Section I. B.

41/ See NYNEX at 18.

42/ See Cox Enterprises at 7.

43/ See TCPA, §§ 2(1), 2(5), 2(6).

inconsistent procedures and criteria. Utilization of company lists is sporadic at best, and standards vary widely, with some companies reestablishing contact with objecting consumers after only one year, while others wait to be contacted by the consumer. 44/ Moreover, consumers are often misled into believing that they have reached all telemarketers in a particular industry. Yet, the comments of the Ohio Public Utilities Commission indicate that those consumers who subscribe to the list maintained by the DMA experience little relief from unwanted calls. 45/

The National Consumers League has observed that "[t]here is no substitute for a comprehensive national policy on unsolicited telemarketing. Industry self-regulation does not generally make good public policy." 46/ Here the League is clearly correct. Self-regulation will only work when market forces actually create sufficient incentives for an industry to internalize all of its costs. But as LeJeune explained in its

44/ See MCI at 3 (names removed from "Do Not Call" list after one year); Private Citizen at 5 (names removed from Olan Mills list after two years).

45/ Ohio PUC at 9.

46/ National Consumers League at 15.

comments, such economic incentives are not present in the telemarketing industry today absent government regulation. 47/

Whatever the success of a few telemarketers in protecting their own reputation, the record as a whole clearly reveals that consumers continue to receive unwanted calls from less scrupulous and more numerous telemarketers. National restrictions on telemarketing are essential to protect consumers from all unwanted telephone solicitations. The good intentions of a few do not relieve the Commission of its responsibility under the Act to restrict live solicitations in a meaningful way.

II. A NATIONAL DATABASE SYSTEM CAN PROTECT CONSUMERS WITHOUT IMPOSING UNDUE BURDENS ON TELEMARKETERS.

A national database, proposed by LeJeune and other parties, provides the best remedy to the telemarketing problems identified in the Act. Such a database can be implemented easily and at reasonable cost. Moreover, this database will protect consumer privacy and simplify enforcement of the TCPA.

LeJeune's opening comments presented a practical, effective and economical national database alternative, utilizing disk and paper media, as opposed to on-line

47/ See LeJeune at 15-16. Telemarketing creates costs in terms of invasions of privacy and nuisance. Telemarketers currently externalize those costs upon all consumers, regardless of their interest in receiving solicitations.

technology. 48/ The system would not require government or consumer funding and would not impose a significant cost burden on telemarketers. The national database could be created, maintained, and distributed on a monthly or quarterly basis, according to Commission mandate. 49/

More specifically, residential consumers would be provided a toll-free number to contact the administrator to be included in the database. Consumer awareness of the database would be accomplished through messages included in residential telephone billing statements, 50/ press releases 51/ and other advertising or publicity efforts initiated by the administrator. As required by the Act, listed numbers would not be available for reprint or distribution in any manner other

48/ See LeJeune at 19-26.

49/ A private database company could maintain the residential subscriber list. Implementation would be simple and require only a minimal initial involvement by the Commission to select an administrator. Many companies would be interested in establishing and maintaining this database, including LeJeune Associates of Florida.

50/ See BellSouth at 8 (noting that a monthly notice is included in billing statements to inform customers of the availability of Florida's database).

51/ The Florida law received widespread media coverage, and similar exposure would be achieved at the national level.

than the distribution of the database to businesses on a monthly or quarterly basis. 52/

The database registration process should include a confirmation notice to avoid mistakes or other problems. After a consumer called the database, a confirmation card could be sent to them to notify them that their number would be included in a "Do Not Call" list and indicate the date when their number would be sent to telemarketers and they could expect to see a reduction in commercial solicitations. This confirmation process also could provide an opportunity for the database administrator to introduce other consumer options. For example, consumers could be sent listings of particular industries, and be given the option to check off those from which they were willing to continue to receive calls, notwithstanding their general desire to avoid most solicitations. This election would be returned to the database administrator and incorporated into the updates for those industries.

The technology to implement a database system presently exists. Telemarketers could opt to purchase the list on diskette, tape or print media. Telemarketing entities would

52/ The TCPA requires that the database be used only to comply with state or federal nonsolicitation requirements and, therefore, the list would not be available for purchase for any other purpose. See 47 U.S.C. § 227(c)(3)(K).

purchase the nonsolicitation list from the administrator at prices that would vary with the coverage required and tailored to assure that even the smallest telemarketing operators would not be unduly burdened.

A. A National Database Is the Most Practical Alternative.

A national database, as proposed by LeJeune, would be practical for use by any size telemarketer. Large national or regional telemarketers could purchase the list of "Do Not Call" numbers on tape or diskette and purge their calling lists. These telemarketers could also use an automatic blocking system, such as LeJeune's Sales-Call Restriction System (SRS). ^{53/} The SRS system is installed at a telemarketer's premises and integrated with its outbound lines. The SRS compares the number of each call placed by the telemarketer against a database of restricted numbers, and blocks calls to numbers in the database. All other calls are promptly completed. Maintaining the system is also easy; telemarketers can update the restriction list provided on diskettes in minutes. The SRS also

^{53/} See LeJeune at 3. The Sales-Call Restriction System (SRS), presently in use in Florida, Texas and Oregon, has proven effective for stockbrokers, real estate agents, insurance solicitors, home improvement services, and others.

provides telemarketers with the flexibility to add and delete numbers from the database.

Smaller state or local telemarketers would have the option to purchase lists sorted by area code or local exchange. A printout of the "Do Not Call" numbers would allow easy cross-checking and verification by local sales agents. This list would be even easier to use than directory markings, because the numbers would be sorted sequentially, much like paper credit card number lists used by small merchants. By checking the list, a local phone solicitor would avoid the time and expense of placing unfruitful sales calls.

B. A National Database Can Be Implemented at a
 Reasonable Cost.

Under LeJeune's proposal, the national database would be self-sustaining and would impose no cost on consumers and only reasonable costs on telemarketers. After careful consideration of the comments of other interested parties in this proceeding, LeJeune has adjusted its cost and revenue estimates to incorporate additional system features which will facilitate use and enforcement of the database.

LeJeune estimates a conservative revenue projection of approximately \$20.2 million from subscriptions to a national database. This projection contemplates preliminary sales estimates of 3,000 national lists at \$750 per quarter; 1,500 regional lists at \$350 per quarter; 10,000 state lists at \$150

per quarter; and 15,500 area code lists at \$50 per quarter. ^{54/} Of course, additional market research would be required prior to actual implementation of the database system.

Administrative expenses associated with the database could easily be covered by this revenue stream. LeJeune anticipates that a national database would cost approximately \$20 million annually. This revised cost estimate is for a more sophisticated system, reflecting the interests and suggestions of other parties. In particular, LeJeune's cost estimate includes confirmation and notification to customers that their phone numbers will be included in the database, updates to the database to reflect customer number changes due to residential moves, and notification and confirmation of consumer complaints, including an "opt in" notification procedure allowing consumers to elect to be contacted by specific industry groups. This estimate includes the cost of computer and software (\$250,000), publicity (\$335,000), subscriber and telemarketer registration (\$13,300,000), subscriber complaint and confirmation (\$6,000,000), number change updates (\$65,000) and database distribution (\$250,000). Seen in perspective, the \$20 million

^{54/} Alternatively, database updates could be distributed monthly for a correspondingly lower fee, or in paper form for a minimal charge. The fees would offset the expense of administration of a national database.

projection is reasonable and would not be overly burdensome on telemarketers.

Although numerous commenters suggested, in passing, that a national database system would be too costly to implement to justify the benefits received by consumers, they rarely bolstered their assertions with supporting cost projections for implementation of the database. 55/ Those cost estimates that were provided lack credibility because they do not describe the nature or functionality of the system upon which they are based. 56/

Clearly most, if not all, of these estimates assume the use of costly on-line number verification systems. 57/ On-line proposals envision the use of Signalling System 7 (SS7) technology to verify dialed numbers on a per query or batch

55/ See, e.g., ANA at 4; Sprint at 10; MCI at 5.

56/ See, e.g., King Teleservices at 2 (estimating start up costs of \$75 million and annual maintenance costs of \$25 million); AT&T at 12 (projecting costs of between \$24 - \$80 million, depending on the number of consumers in the database and the method of receiving customer information); DMA at 25 (quoting estimates of \$70 million for initial start-up and on-going \$20 million annual maintenance costs); Sears, Roebuck at 4 (estimating initial costs in the "tens of millions" and ongoing costs in the "millions").

57/ For example, AT&T's estimates do not include a line item for issuing updates. See AT&T Exhibit A at 1-2.

basis. 58/ This technology would be much more expensive to implement than an off-line solution: ITN estimates an annual cost of \$10,000 per year for telemarketers. 59/ AT&T notes that the necessary technology is not likely to be available for several years due to the additional deployment of SS7 network technology that would be necessary at both the local and interexchange level. 60/ Southern New England Telephone (SNET) also notes that SS7 screening capability is not universally available. 61/

NYNEX's objections based on its experience in Massachusetts are also inapplicable to LeJeune's proposal. The failure of the Massachusetts system lies in defective enabling regulation -- telemarketers are not compelled to use the list. Because the list was purchased by almost no one, the costs of the database were not defrayed by revenue from telemarketer

58/ 60 See ITN at 2; USIN at 2.

59/ ITN assumes an upper cost of \$0.06 per query and projects a daily call volume of 18-20 million calls. ITN at 6-7.

60/ AT&T at 15. In addition to the high cost of using SS7 technology, there would be problems of call completion delays. Currently, this technology is used to verify credit card purchases. Call set-up times for these verifications depend on the manner in which the Local Exchange Company has deployed SS7 technology and could be unduly time-consuming and costly to telemarketers.

61/ SNET at 5-6; see also Pacific Telesis at 13.